Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of the Commission's Rules	)	**CC Docket No. 94-102**
To Ensure Compatibility with	)	**RM-8143**
Enhanced 911 Emergency Calling Systems	)	

OPPOSITION OF THE STATE OF HAWAII

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SUMMARY

The State of Hawaii opposes both the petition for reconsideration of CTIA and the petition for reconsideration of BellSouth. CTIA contends that the Commission should expressly prohibit Public Safety Answering Points ("PSAPs") from requiring wireless providers to recover E911 implementation costs directly through the charges they impose on subscribers. This recommendation should be rejected for at least three reasons. First, the Commission has already considered and rejected this recommendation twice; there is nothing new in the record that supports limiting a state's choice of cost recovery methodologies. Second, prematurely setting any limits on cost recovery through the market place contradicts the long-standing policy of the Commission to encourage market-based pricing in competitive telecommunications markets. Third, requiring PSAPs in Hawaii to pay both the agency's and the wireless provider's costs for E911 services will cause delays in the deployment of E911 services, or make them cost-prohibitive, which would be contrary to the public interest of implementing E911 services promptly and ubiquitously.

Both CTIA and BellSouth recommend that the Commission preempt state tort laws by adopting a federal mandate limiting the liability of wireless providers in the planning, construction, and operation of the E911 services. This recommendation should also be rejected for at least three reasons. First, the Commission has already considered and rejected this recommendation twice; there is nothing new in the record that supports stripping states of their traditional responsibilities in public safety and telecommunications. States should be allowed to implement consumer protection policies and tort law as they see fit to compensate victims of carrier negligence. Second, limiting a wireless provider's liability for negligence would likely remove, or at least diminish, the provider's incentive to develop and operate reliable E911 services. Third, limiting liability would encourage a wireless provider to misrepresent, or at least avoid educating the public concerning, the questionable accuracy and reliability of wireless E911 service.

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OPPOSITION OF THE STATE OF HAWAII

The State of Hawaii (the "State")[1] hereby opposes both the petition for reconsideration and clarification of the Cellular Telecommunications Industry Association ("CTIA") and the petition for reconsideration of BellSouth Corporation ("BellSouth") filed on February 17, 1998 concerning the Memorandum Opinion and Order in the above-captioned proceeding.[2]

I. INTRODUCTION: BOTH PETITIONS SHOULD BE DENIED

CTIA contends that the Commission should expressly prohibit Public Safety Answering Points ("PSAPs") from requiring wireless providers to recover E911 implementation costs directly through the charges they impose on subscribers. This recommendation should be rejected for at least three reasons. First, the Commission has already considered and rejected this recommendation twice; there is nothing new in the record that supports limiting a state's choice of

[1] These comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs.

[2] Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Memorandum Opinion and Order, CC Docket No. 94-102, FCC 97-402 (released Dec. 23, 1997) ("Second E911 Order").

cost recovery methodologies. Second, prematurely setting any limits on cost recovery through the market place contradicts the long-standing policy of the Commission to encourage market-based pricing in competitive telecommunications markets. Third, requiring PSAPs in Hawaii to pay both the agency's and the wireless provider's costs for E911 services will cause delays in the deployment of E911 services, or make them cost-prohibitive, which would be contrary to the public interest of implementing E911 services promptly and ubiquitously.

Both CTIA and BellSouth recommend that the Commission preempt state tort laws by adopting a federal mandate limiting the liability of wireless providers in the planning, construction, and operation of the E911 services. This recommendation should also be rejected for at least three reasons. First, the Commission has already considered and rejected this recommendation twice; there is nothing new in the record that supports stripping states of their traditional responsibilities in public safety and telecommunications. States should be allowed to implement consumer protection policies and tort law as they see fit to compensate victims of carrier negligence. Second, limiting a wireless provider's liability for negligence would likely remove, or at least diminish, the provider's incentive to develop and operate reliable E911 services. Third, limiting liability would encourage a wireless provider to misrepresent, or at least avoid educating the public concerning, the questionable accuracy and reliability of wireless E911 service. Unlike fixed, landline E911 services, the current technology used to provide wireless E911 services is often far less accurate and reliable in locating callers, due to the fact that the wireless standard only requires that callers be located within 125 meters two-thirds of the time.

II. THE COMMISSION CORRECTLY DETERMINED NOT TO PRESCRIBE A FEDERAL COST RECOVERY MECHANISM FOR E911 SERVICES

Pursuant to Section 20.18(f) of the Commission's rules, CMRS providers must provide enhanced 911 ("E911") services "only if a mechanism for the costs relating to the provision

of such services is in place."[3] CTIA's petition asks the Commission to hold that a PSAP requesting the deployment of wireless E911 services may not require the wireless carrier to bill its customers for the cost of the services.[4] CTIA's approach would require that the PSAP or another governmental entity pay for the cost of the E911 services.

CTIA's approach should be rejected. Its petition raises no new issues, but simply reiterates its argument for a federal cost recovery mechanism. The Commission has already twice considered -- and rejected -- a federal cost recovery mechanism for wireless E911. In 1996, the Commission first rejected the idea. In the First E911 Order , the Commission noted that many wireless companies had argued in favor of a federal cost recovery mechanism (e.g., AT&T, PCIA, BellSouth, Nextel, and APC). Nevertheless, the Commission concluded:

> [W]e will not prescribe a particular E911 cost recovery methodology at this time, for two reasons. First, the record does not demonstrate a need for such action. . . . [L]ocal and state governments have pursued innovative and diverse means for the funding of wireline E911 services, and it is reasonable to anticipate that these governments will follow a similar course with regard to wireless E911. Second, an inflexible Federal prescription would deny carriers and government officials the freedom to develop innovative cost recovery solutions tailored to local conditions and needs. Such a prescription also might unintentionally discourage carriers from developing creative technological approaches to E911 deployment. Thus, Federal action at this time actually might undercut and delay efforts to deploy wireless E911 capabilities.[5]

In 1997, the Commission again rejected the idea. In the Second E911 Order, the Commission noted that wireless carriers again had argued for a federal cost recovery mechanism

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[3] 47 C.F.R. § 20.18(f).

[4] Petition for Reconsideration and Clarification of the Cellular Telecommunications Industry Association, CC Docket No. 94-102 (filed Feb. 17, 1998) at 17 ("CTIA Petition").

[5] Revision of the Commission's Rules To Ensure Compatibility with Enhanced 911 Emergency Calling Systems, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18676, 18722 (1996) ("First E911 Order").

(e.g., Ameritech, AT&T, PCS PrimeCo, PCIA, and Omnipoint). Nevertheless, the Commission again rejected their arguments, stating that the carriers had raised no new issues:

> We reaffirm our decision and deny petitions to establish a Federal cost recovery mechanism for the reasons stated in the *E911 First Report and Order*. We continue to find no adequate basis on this record for preemption of the various state and local funding mechanisms that are in place or under development, or for concluding that state and local cost recovery mechanisms will be discriminatory or inadequate. [6]

CTIA has provided the Commission with no new facts or theories that would justify the Commission altering its reasoned decision on this issue. The State can understand CTIA's desire to find a set of "deep pockets" (i.e., the PSAPs) from which to recover its E911 costs. However, a federal mandate disallowing cost recovery from wireless customers generally and requiring cost recovery from the PSAP or other governmental entity contradicts the Commission's policy of allowing state and local agencies and the wireless industry to develop innovative solutions to cost recovery. CTIA's approach is especially troublesome because, if adopted, the "PSAP pays all costs" methodology could be construed as the only approach "approved" by the Commission, and the only mechanism that state and local authorities would feel safe in adopting.

Besides undermining the ability of states to develop their own cost recovery solutions, CTIA's recommendation would jeopardize the deployment of wireless E911 services. Many jurisdictions, including Hawaii, fund emergency and safety services through state or local taxes. Requiring PSAPs in these jurisdictions to pay all of the implementation costs of wireless E911 service would be certain to delay, and may even cancel altogether, PSAP requests for E911 service. PSAP requests would decrease significantly for the simple reason that their funding

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[6] Second E911 Order at ¶ 145.

responsibility would increase dramatically.[7] Such a result would thwart the Commission's policy objective of deploying wireless E911 services ubiquitously and promptly.

From the State's perspective, Act 225 (1995 Hawaii Session Law) establishes the State policy of encouraging local competition and requires the opening of all telecommunications networks through interconnection. One of the purposes of Act 225 is to rely upon effective competition, if practicable, as the mechanism by which telecommunications consumers would receive high service quality, innovative services and lower prices.[8] Act 225 reflects the intention of the State to use the competitive process as the tool by which improved services in a competitive market are deployed and costs are recovered. The State of Hawaii should be permitted "to develop innovative cost recovery solutions tailored to local needs and conditions"[9] consistent with the policies of Act 225 and the needs of wireless consumers and providers.

Representatives of the wireless carriers operating in Hawaii have introduced bills in the Hawaii legislature seeking a state-mandated surcharge by which to recover the costs of E911 services deployed in the State.[10] These bills are contrary to the above-stated purpose of Act 225 and are unnecessary. Now that the wireless telecommunications market has been declared competitive, CMRS rate regulation by the State of Hawaii is no longer permitted and has been specifically denied.[11] The State finds it perplexing that the wireless industry, which fought so vigorously to become a competitive industry and to avoid rate regulation and tariff filings, is now

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[7] In any event, PSAPs will incur costs for E911 because of the equipment they must purchase.

[8] 1995 Haw. Sess. Laws 225, Section 1(7).

[9] First E911 Order, 11 FCC Rcd at 18722.

[10] See House Bill No. 3148 (1998) and Senate Bill No. 3142 (1998).

[11] See Petition on Behalf of the State of Hawaii, Public Utility Commission, for Authority to Extend Its Rate Regulation of Commercial Mobile Radio Services in the State of Hawaii, 10 FCC Rcd 7872 (1995).

asking the Commission and state legislatures to impose a regulatory mandate on how the industry should recover its E911 costs.

There is, of course, nothing preventing wireless providers from collecting E911 costs directly from their customers through rate surcharges. The wireless provider can even label the surcharge an "E911 surcharge" if it desires to do so. Such a market-based approach does not require either the mandate of state law or FCC regulation – mandates that would, in contrast, be required if PSAPs were to be held responsible for the costs. Because the wireless industry has been declared competitive, it is appropriate from a legal and economic point of view to let the competitive process determine how the costs for E911 services will be recovered. The point of deregulating telecommunications providers in competitive markets is to employ the efficiencies of the market place to ensure quality services at the lowest reasonable cost. In contrast, mandating cost recovery in a specific fashion is more likely to facilitate "gold-plating" of E911 services than would using the discipline of competition to set the price to the customer. There is no compelling reason to require that PSAPs throughout the nation be saddled with all the costs of E911 services. Wireless providers need to take some of the responsibility.

If, however, the FCC were to decide that PSAPs should be responsible for all E911 system costs, the PSAP or other state agency must be permitted to regulate the system design to be used and have the right to regulate the costs of the E911 system. Other than using competitive pricing as the State recommends, this would be the only viable means by which PSAPs, and those who fund PSAPs, would be able to fairly determine that wireless carriers are using the most cost-effective means for providing E911 services. Of course, state regulation of E911 system design and costs may raise jurisdictional issues under Section 332(c) of the Communications Act. Alternatively, the FCC must assume a broader regulatory role. The wireless carriers cannot have it

both ways – they cannot argue for regulation only when it helps them. If they want the regulator to mandate an allocation of E911 costs, then they must also agree to have the regulator scrutinize all facets of the deployment and provisioning of E911 service. Of course, all of this regulation could be avoided if market-based pricing were used to recover E911 expenses.

III. THE COMMISSION CORRECTLY DETERMINED NOT TO LIMIT WIRELESS PROVIDERS' LIABILITY RESULTING FROM THE PROVISION OF E911 SERVICES

In their petitions, both CTIA and BellSouth resurrect the issue of limiting the liability of wireless providers that provide E911 service negligently. The State urges the Commission to reject their recommendation. Their petitions raise no new issues, but simply reiterate their past arguments in favor of federally-mandated limited liability. The Commission has already twice considered -- and rejected -- a federal limit on carrier liability resulting from the provision of E911 service. In the First E911 Order, the Commission noted that PCIA and U S WEST argued for a federal limitation of liability. Nevertheless, the Commission rejected their arguments, stating:

> We conclude that it is unnecessary to exempt providers of E911 service from liability for certain negligent acts . . . . If the E911 wireless carriers wish to protect themselves from liability for negligence, they may attempt to bind customers to contractual language, require public safety organizations to hold them harmless for liability . . . or, if the liability is caused by the rulings of the Commission, argue that the actions complained of were caused by acts of public authority. We are not persuaded by the argument advanced by some parties that the Commission should provide wireless carriers the same broad immunity from liability that is available to landline local exchange carriers. This local exchange carrier immunity generally is a product of provisions contained in local exchange carrier tariffs. We conclude that covered carriers can afford themselves similar protection by including similar provisions in contracts with their customers. . . . In our view, displacing the jurisdiction of state courts over tort suits for negligence in installation, performance, provision, or maintenance of E911 systems is not necessary to the inauguration of E911 service. We therefore

> are unable to find that general exemption from liability is essential to achieving the goals of the Communications Act.[12]

In 1997, the Commission again rejected the idea. In its Second E911 Order, the Commission noted that wireless carriers again had argued for a federal limitation of liability (e.g., Ameritech, AT&T, BellSouth, Omnipoint). Nevertheless, the Commission again rejected their arguments, stating that the carriers had raised no new issues:

> None of the petitioners . . . presents arguments sufficient to persuade us to modify our determination that it is unnecessary to exempt providers of E911 service from liability for certain negligent acts and to preempt state tort law. [S]tates have particular interests in telecommunications and public safety matters, including operation of 911 emergency services. Although the Commission may preempt state regulation when preemption is necessary to protect a valid Federal regulatory objective, we believe it is premature and speculative for the Commission to establish a national standard of liability protection in order to achieve rapid deployment of wireless E911 systems. . . . Petitioners fail to persuade us that our decision to examine the need for specific preemption in the future on a case-by-case basis was wrong.
>
> Petitioners' claims that the limitation of liability is necessary are not convincing, particularly considering the fact that major carriers are already transmitting all 911 calls and no evidence of liability problems is presented in the record of our reconsideration proceeding. Contrary to petitioners' speculative claim that current state laws are not "likely" to provide wireless carriers with adequate protection against liability, the record indicates that state legislative bodies and state courts are developing their own solutions to liability issues. While we recognize that not all states currently provide specific statutory limitation of liability protection for wireless carriers, we believe that state courts and state legislatures are the proper forums in which to raise this issue, not the Commission.[13]

The State of Hawaii can find no new argument or fact requiring the Commission to modify its position. Moreover, the wireless providers, when convenient to their positions, make an

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[12] First E911 Order, 11 FCC Rcd at 18727-28.

[13] Second E911 Order at ¶¶ 137-38.

analogy to landline providers.[14] The wireless companies want the same level of protection that they believe monopoly landline providers are afforded, even though this varies by jurisdiction. In Hawaii, there is one incumbent local exchange provider, GTE Hawaiian Telephone Company ("GTE Hawaiian"). GTE Hawaiian is the monopoly provider of basic residential and business exchange service and limits its liability through tariffs filed with the Hawaii Public Utilities Commission ("HPUC").

GTE Hawaiian is accorded limited liability because its conduct and rates are regulated under traditional rate base, rate of return regulation. As a result, the capabilities and costs associated with landline E911 service are examined and determined by the HPUC. The HPUC is directly responsible for ensuring that the planning, construction and operation of the landline E911 service is prudent. Furthermore, the savings that result from the reduced risk of liability are passed through to the ratepayers in the ratemaking process.

In contrast, an unintended consequence of limiting liability for wireless providers -- which currently operate in the absence of state regulatory oversight -- is the diminished incentive of wireless providers to develop, deploy and operate the safest and most cost-effective E911 system. Without responsibility or regulatory review, there is little incentive for a negligent wireless carrier to improve its E911 services. The prudence review and rate-setting components of the regulatory process do not exist in the wireless industry. The wireless providers eschew rate regulation and do not want to be burdened by state regulation of E911 standards. Accordingly, the Commission should not limit the liability of wireless carriers.

Hawaii also is concerned that the technical standard for locating the position of the caller is often so problematic as to be misleading to the customer. The public dilemma is easily

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[14] See CTIA Petition at 12, 14; BellSouth Petition for Reconsideration, CC Docket No. 94-102 (filed Feb. 17, 1998) at 3-5 ("BellSouth Petition").

illustrated. For, instance, if a customer is mandated to pay the carrier an additional 50 cents per month as a wireless E911 service surcharge, that customer will reasonably expect that wireless E911 service will offer the same protection as landline service. This, however, is not the case. In fact, location of a caller within 125 meters two-thirds of the time will leave emergency response teams looking for the proverbial "needle in a haystack" (or, more accurately, a handset in a condominium, office building or park) in life-threatening circumstances. Customers should be made aware of the discrepancy between the accuracy of landline and wireless E911 services. A federal mandate limiting liability would continue to mask the unresolved issues of carrier accountability and consumer education. Once again, the "laboratory of the states" could be of great assistance to federal regulators in developing creative solutions to these issues.

CTIA's and BellSouth's proposals to limit wireless providers' liability through "notification" are wholly unreasonable from a consumer awareness and protection viewpoint.[15] Filing generic limitations of liability at the Commission would leave the millions of wireless subscribers throughout the nation without any realistic means of learning what their rights and obligations are regarding E911 service. Even more inappropriate is CTIA's recommendation that "the Commission should conclude that 911 callers impliedly consent to be bound by the liability limitations contained in informational contracts filed by carriers."[16] Fairness dictates that consent by wireless subscribers not be implied, but real and actual.

Hawaii considers broad limitations of liability as suggested by CTIA and BellSouth to be contrary to the public interest. In any event, the extent to which liability is limited, if at all, for wireless providers is an issue appropriate for a state to decide in light of its own consumer protection policies and tort laws.

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[15] See CTIA Petition at 13; BellSouth Petition at 3-5.
[16] CTIA Petition at 15-16 n.36.

IV. CONCLUSION

For the reasons discussed above, the FCC should: (1) reaffirm its decision not to impose a federal cost recovery mechanism for wireless E911 service; and (2) reaffirm its decision not to impose a federal mandate limiting the liability of wireless companies providing E911 service. The petitions for reconsideration filed by CTIA and BellSouth should, therefore, be DENIED.

Respectfully submitted,

THE STATE OF HAWAII

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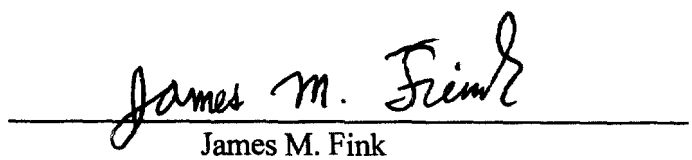
March 18, 1998

CERTIFICATE OF SERVICE

I, James M. Fink, do hereby certify that on this 18th day of March, 1998, I have caused a copy of the foregoing "Opposition of the State of Hawaii" in CC Docket No. 94-102 to be served via first class United States Mail, postage pre-paid, upon the persons listed below.



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